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Re: Resolution M-4846 Adopting Commission Enforcement Policy –  
Joint Comments of San Diego Gas & Electric Company and  
Southern California Gas Company

## **INTRODUCTION**

San Diego Gas & Electric Company (“SDG&E”) and Southern California Gas Company (“SoCalGas”) (collectively, the “Joint Utilities”) appreciate the opportunity to submit these comments regarding the California Public Utilities Commission’s (“Commission”) Resolution M-4846 adopting the Commission Enforcement Policy (“Policy”).

The Joint Utilities support the laudable goals set forth in the Policy, including efforts towards increased transparency of Commission enforcement actions, promoting consistent enforcement practices, ensuring due process, and providing a more defined set of guidelines governing the Commission’s general administration of its enforcement policies and practices. In particular, the Joint Utilities appreciate the Commission’s efforts to make clear that the Policy is intended to simply establish guiding principles on enforcement approaches and does not seek to modify or interfere with existing citation programs.<sup>1</sup>

Although the Joint Utilities support the overall objectives underlying the Policy, the Joint Utilities continue to have some notable concerns regarding several provisions set forth in the Policy, which are problematic if adopted as written. Indeed, some of the provisions in the Policy directly contradict the Findings & Conclusions set forth in the Resolution. The Joint Utilities

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<sup>1</sup> Resolution at p.1 & Findings & Conclusions 23.

submit this comment letter to highlight the inconsistencies between language contained in the Policy and the Findings & Conclusions contained in the Resolution, as well as the substantive legal and policy concerns that the Commission should consider before adopting the Policy.

**THE LANGUAGE OF THE POLICY DIRECTLY CONTRADICTS FINDINGS & CONCLUSIONS SET FORTH IN THE RESOLUTION**

As currently written, the Policy gives the staff unilateral discretion to decide whether to pursue an alleged violation under an existing Citation and Compliance Program or pursue different enforcement actions based on a series of enumerated factors.<sup>2</sup> Clearly, granting staff discretion to *either* pursue an alleged violation under an existing Citation and Compliance Program *or* ignore the existing Citation and Compliance Program altogether to pursue a different enforcement action as staff may see fit is the equivalent of superseding or modifying the affected citation programs.

Yet, the Finding & Conclusions set forth in the Resolution make clear that “[n]othing in the Enforcement Policy modifies or interferes with existing citation programs.”<sup>3</sup> These two statements are diametrically opposed to one another and creates ambiguity and confusion about the application of the Policy. Similarly, the fact that the Policy is enabling staff to employ two new administrative tools – *i.e.*, Administrative Consent Orders and Administrative Enforcement Orders – that are not available under the existing Citation and Compliance Programs, is itself a modification to the existing citation programs. Yet, the Resolutions states that “[n]o existing citation programs are altered by this Resolution and Enforcement Policy.”<sup>4</sup>

Thus, while the stated objectives of the Resolution make clear that the Policy is not intended to replace, modify or otherwise supersede existing enforcement programs, the Joint Utilities are concerned that the Policy language as currently written belies and in fact directly contradicts that intent. Adopting the Policy in its current form has the potential of causing confusion and undermine the stated goals of promoting clear and consistent enforcement practices, ensuring due process, and providing a more defined set of guidelines governing the Commission’s general administration of its enforcement policies and practices. The inherent contradictions may also run afoul of certain procedural requirements and well-established law.

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<sup>2</sup> Policy, p. 11 (“If staff discover a violation that can be addressed under an existing Citation and Compliance Program, staff shall determine whether to issue a citation as allowed under the Citation and Compliance Program or take a different enforcement action.”).

<sup>3</sup> Resolution at Findings & Conclusions No. 23; *See also* Order No 2 at p. 15 “No other portion of Commission decisions, order or resolutions are intended to be modified by this resolution.”

<sup>4</sup> Resolution, p. 11.

In order to resolve the contradiction between the Findings & Conclusions set forth in the Resolution and the Policy, the Joint Utilities suggest that the Policy be modified to expressly state that the Policy only applies to violations which cannot be addressed under an existing Citation and Compliance Program.

**THE POLICY RAISES SEVERAL IMPORTANT LEGAL ISSUES THAT SHOULD BE ADDRESSED BEFORE IT CAN BE ADOPTED**

The Joint Utilities continue to share significant concerns about various substantive aspects of the Policy, which are highlighted below.

For example, the Policy provides for the widespread delegation of the Commission's adjudicatory and discretionary powers to its Staff. The Joint Utilities are unaware of any existing statutory authority that would allow Staff to take the enforcement actions for any alleged violation within the purview of the Commission as contemplated by the Policy. In the Commission's other citation programs, the Staff's authority to take enforcement actions is founded in statutory authority, which were subsequently implemented by Commission resolutions and decisions. For example, the Gas Citation and Electric Citation Programs were authorized by Public Utilities Code section 1702.5. Under that statute, the Commission was permitted to develop a safety enforcement program, which specifically allowed for the issuance of citations and fines by Staff.<sup>5</sup> However, no such express statutory authority is apparent here with respect to the Policy.

Similarly, the Policy's provisions regarding penalties are problematic. The Policy does not identify any statutory authority allowing the Commission to delegate the discretion to assess monetary penalties for any alleged violation within the purview of the Commission. In instances where Staff is allowed to set the amount of monetary penalties, the authority is limited to specifically identified citation programs, such as the Gas Citation Program. There, Public Utilities Code section 1702.5 specifically allowed the Commission to institute a citation program which permitted the Staff to set monetary penalties.<sup>6</sup> However, the Policy would authorize Staff to circumvent or ignore the very same citation programs from which their authorization to assess monetary penalties is derived. Moreover, the Policy's measure for assessing penalties against potential offenders also may well be contrary to existing law. Appendix I (Penalty Assessment Methodology) sets forth the factors that "shall be used in settlement penalties that are appropriate

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<sup>5</sup> See also e.g. Core Transport Agent Citation Program (Public Utilities Code section 985(h) authorized the Commission to "adopt additional core gas consumer protection standards that are in the public interest" and the Commission subsequently adopted Resolution UEB-003 and Decision 18-02-002 which allowed CPED to issue citations and fines.)

<sup>6</sup> Public Utilities Code section 1702.5(a)(3).

to a violation.”<sup>7</sup> To the extent that methodology is inconsistent with other precedent, the Penalty Assessment Methodology cannot stand.<sup>8</sup>

In addition, the Policy implicates due process concerns for the regulated utilities. The essence of due process, a right guaranteed by both the United States and California Constitution, is that the government may not deprive an individual of life, liberty, or property without notice and opportunity to respond, in a manner appropriate to the nature of the case.<sup>9</sup> Under the Policy, the Commission is allowing the Staff to serve both adjudicative and investigative functions. At a minimum, the lack of clarity on how the Policy would function with the same staff members investigating an alleged wrongdoing, initiating and adjudicating an enforcement action and imposing fines creates the potential for bias and due process issues.<sup>10</sup>

Similarly, the substantive provisions of the Policy implicate other due process concerns. For example, the Policy does not allow regulated entities to conduct discovery or subpoena staff which hinders the entities ability to respond or defend itself in the enforcement actions contemplated under the Policy. Similarly, the Policy seemingly creates an evidentiary presumption that the regulated utilities’ managers, “absent clear evidence to the contrary,” condoned the day-to-day actions of their subordinates.<sup>11</sup> Such a presumption would be contrary to the existing requirements that the burden of proof lies with the Staff who must prove management’s knowledge of wrongdoing by a preponderance of evidence.<sup>12</sup> Finally, the Policy contains the troubling statement that “nothing in this policy document shall be used as the basis of a regulated entities’ defense to any enforcement action.”<sup>13</sup> Thus, on its face, the Policy binds

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<sup>7</sup> Policy, p. 16-21.

<sup>8</sup> See e.g., Public Utilities Code section 2104.5 (for violations involving safety standard for pipeline facilities or the transportation of gas, the amount of the penalty must be determined by “the appropriateness of such penalty to the size of the business of the person charged, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance, after notification of a violation.”)

<sup>9</sup> See *Coleman v. Department of Personnel Administration*, 52 Cal.3d 1102, 1108, 1112 (1991).

<sup>10</sup> See *Brown v. City of Los Angeles*, 102 Cal.App.4th 155, 177-178 (2002) (“The instant order also violates the requirement that the decision-maker be neutral because the Chief of Police initially authorized the punitive action and is also the final decisionmaker on the administrative appeal”); *Applebaum v. Bd. of Directors*, 104 Cal.App.3d 648 (1980) (a lack of procedural fairness exists where nearly half the members of a review panel were members of the committee which made the original decision to suspend); *Agric. Labor Relations Bd. v. Superior Ct.*, 4 Cal.App.5th 675, 693–94 (2016).

<sup>11</sup> Policy, p. 18.

<sup>12</sup> See D.16-08-020 (burden of proof in investigatory proceeding lies with Staff and must be met by a preponderance of evidence).

<sup>13</sup> *Id.*, p. 1.

the regulated entities, but does not allow them to defend themselves by relying on its provisions or the Staff's failure to adhere to it. These specific examples show that implementation of the Policy potentially will deprive the regulated entities of their due process rights.

## CONCLUSION

The proposed Policy contains several internal inconsistencies and raises several unanswered legal and policy questions that must be fully addressed in order to ensure that it achieves the Commission's goals of clarity, consistency and transparency underlying the Policy. The Joint Utilities appreciate the Commission's consideration of these comments and requests that these recommendations be incorporated into the Policy.

Respectfully submitted this 26<sup>th</sup> day of October, 2020.

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cc: Service List for General Order 96-B